

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL THOMAS THRASHER

Petitioner,

Case No. C14-1632 JCC-BAT

V.

DEAN MASON,

Respondent.

REPORT AND RECOMMENDATION

Petitioner Michael Thomas Thrasher requests that the Court dismiss the 28 U.S.C. § 2254 petition filed herein on October 17, 2014. Dkt. 7. The Court recommends that the petition be dismissed with prejudice because it is duplicative, that the pending application to proceed in forma pauperis (Dkt. 1) be denied as moot, and a certificate of appealability denied.

DISCUSSION

Pro se petitioner Michael Thomas Thrasher petitions for 28 U.S.C. § 2254 relief from his 1992 conviction for second degree assault with sexual motivation. Dkt. 1-1. His motion for leave to proceed *in forma pauperis* is pending. Dkt. 5. On October 8, 2014, Mr. Thrasher, proceeding *pro se* and *in forma pauperis*, filed a 28 U.S.C. § 2254 petition for relief from this same conviction in *Thrasher v. Russell*, No. 14-1553 RSL-BAT. Dkt. 6 therein. The Court directed service of the petition on October 10, 2014 and counsel for Mr. Russell filed a notice of

1 Appearance on October 20, 2014. Dkt. 10. The matter is still pending.

2 Because the petition filed in this case is essentially the same petition, involving the same
3 questions of law and fact, as the petition Mr. Thrasher previously filed in Case No. 14-1553, the
4 Court ordered Mr. Thrasher to show cause why the petition in this case should not be dismissed
5 as duplicative. Dkt. 6. By letter received by the Clerk on November 12, 2014, Mr. Thrasher
6 states that the petition should be dismissed as it is duplicative. Dkt. 7.

7 Federal Rule of Civil Procedure Rule 41(a)(1) allows a party to dismiss an action without
8 leave of court prior to an answer or summary judgment motion being filed. Here, no adverse
9 party has yet been served with the habeas petition in this action and the action is clearly
10 duplicative. This Court therefore recommends that this matter be DISMISSED WITH
11 PREJUDICE. If this recommendation is adopted, the Court also recommends that Mr.
12 Thrasher's application to proceed in forma pauperis (Dkt. 1) be DENIED as moot.

13 **CERTIFICATE OF APPEALABILITY**

14 A prisoner seeking post-conviction relief under § 2254 may appeal a district court's
15 dismissal of the petition only after obtaining a certificate of appealability ("COA") from a district
16 or circuit judge. A COA may be issued only where a petitioner has made "a substantial showing
17 of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(3). A prisoner satisfies this
18 standard "by demonstrating that jurists of reason could disagree with the district court's
19 resolution of his constitutional claims or that jurists could conclude the issues presented are
20 adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327
21 (2003).

22 Under this standard, the Court finds that no reasonable jurist would disagree that Mr.
23 Thrasher's petition is duplicative and should be dismissed. Mr. Thrasher should address whether

1 a COA should issue in his written objections, if any, to this Report and Recommendation.

2 **OBJECTIONS AND APPEAL**

3 This Report and Recommendation is not an appealable order. Therefore a notice of
4 appeal seeking review in the Court of Appeals for the Ninth Circuit should not be filed until the
5 assigned District Judge enters a judgment in the case.

6 Objections, however, may be filed and served upon all parties no later than **Friday,**
7 **December 5, 2014.** The Clerk should note the matter for **Wednesday, December 10, 2014**, as
8 ready for the District Judge's consideration if no objection is filed. If objections are filed, any
9 response is due within 14 days after being served with the objections. A party filing an objection
10 must note the matter for the Court's consideration 14 days from the date the objection is filed
11 and served. The matter will then be ready for the Court's consideration on the date the response
12 is due. Objections and responses shall not exceed five (5) pages. The failure to timely object
13 may affect the right to appeal.

14 DATED this 14th day of November, 2014.

15 
16 BRIAN A. TSUCHIDA
17 United States Magistrate Judge
18
19
20
21
22
23